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STATUS OF RESIDENT ALIENS WHO ARE SUBJECTS OR CITIZENS OF NATIONS AT WAR WITH THE UNITED STATES.

Mr. President, and Members of the Richmond Bar Association:

Aside from the interest necessarily attached to questions directly or indirectly involved in the present war, the determination of the status of resident aliens who are subjects or citizens of the nations at war with the United States makes it necessary to consider certain legal questions which are of independent interest because they involve the reconcilement of three distinct propositions or principles of law—each apparently supported by authority—which on their face are incapable of reconcilement.

The first is, that as soon as war is declared between the United States and a foreign country all business intercourse and communication between the citizens of the two nations must immediately cease, whether the subjects of the hostile nation are residents of this country, or of the enemy nation.

The second is, that citizens or subjects of an enemy nation, who are domiciled in the United States, become to all intents and purposes citizens of the United States after war is declared—in so far as their right to enter into contracts and to have business intercourse with citizens of the United States is concerned.

The third is, that no resident or domiciled alien can become a citizen of the United States without complying with the naturalization laws of the United States. That no subject of an enemy nation can become naturalized after war is declared and that all subjects, denizens or citizens of an enemy nation may be treated as alien enemies after a declaration of war.

Each of these propositions is apparently supported by authority but it is evident that all three can not be consistently sustained. In order to reconcile them it is necessary to analyze the authorities which seem to support them.

In the case of *United States* v. *Grossmayer,* 76 U. S. 72, 73, the court said:

> "It has been found necessary, as soon as war is commenced, that business intercourse should cease between citizens of the respective parties engaged in it, and this necessity is so great that all writers on public law agree that it is unlawful, *without any express declaration of the sovereign on the subject.*"

In *Montgomery* v. *United States,* 82 U. S. 395, 400, the court said:

> "Nothing is clearer, says President Woolsey (International Law, Sec. 117), than that all commercial transactions of whatever kind (except ransom contracts), *with the subjects,* or *in the territory of the enemy,* direct or indirect, as through an agent or partner who is neutral, are illegal and void."

Again in *United States* v. *Lapens,* 84 U. S. 601, 602, the court said:

> "All contracts *with the subjects or in the territory of the enemy,* whether made directly by one person, or indirectly through an agent, who is neutral, are illegal and void. This principle is now too well settled to justify discussion. No property passes and no rights are acquired under such contracts."

Similar language is used in a number of other cases which it is not necessary to quote.[1]

Construing this language literally, it would seem to be clearly established that no citizen or subject of a nation with which the United States is at war has any right to enter into contractual relations or to have any business intercourse of any sort with a citizen of the United States. It will be observed that this prohibition, according to the language of the courts, extends to contracts "with the subjects or in the territory of the enemy." This would seem to include those subjects or citizens of an enemy nation which are domiciled in the United States, as well as those residing within the jurisdiction of the enemy nation.

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1. Hamilton *v.* Dillin, 88 U. S. 73; Mitchell *v.* United States, 88 U. S. 350; The William Bagaley, 72 U S. 377; Woods *v.* Wilder, 43 N. Y. Rep. 164; Scholfield *v.* Eichelborger, 32 U. S. 586; Burbank *v.* Conrad, 96 U. S. 291.

In support of the second proposition and in direct conflict with this view, however, we find that the text writers apparently treat all citizens of an enemy nation who are domiciled in the United States at the outbreak of war as entitled to the privileges of citizenship in this country, in so far as their right to contract and deal with citizens of the United States is concerned.

President Woolsey of Yale, who was an acknowledged authority on International Law, states that:

> "The nationality of individuals in war depends not on their origin or upon their naturalization, but upon their domicile." [2]

If this be literally accepted as the true principle it would seem to follow that a citizen of an enemy nation domiciled in the United States would immediately, or within a reasonable time, after the outbreak of war cease to be a citizen or subject of that country and become a citizen of the United States. It could hardly have been the intention of President Woolsey, however, to subscribe to the view that a declaration of war by a foreign nation could have the legal effect of making its citizens or subjects domiciled in the United States ipso facto citizens of the United States, and the word "nationality" was no doubt used in a more restricted sense. It would perhaps be more accurate to say that the enemy status of an alien after the outbreak of war is determined by domicile rather than by citizenship.

According to the text of the American & English Encyclopedia of Law, the authorities hold that:

> "Apart from cases of direct assistance to the enemy, the question of domicile is controlling in determining whether one is to be considered an enemy or a neutral, the theory being that one contributes to the resources of the country in which he is domiciled, and is consequently to be considered as a subject thereof." [3]

The rule as stated in *Livingston* v. *Maryland Ins. Co.*[4] is that:

> "Whenever a person is bona fide domiciled in a particular country, the character of the country irresistibly attaches to him.

2. Woolsey on Int. Law, 6th ed., § 183.
3. Vol. 16, page 1146, 2d ed., Am. & Eng. Enc. of Law.
4. 7 Cranch (U. S.) 542.

> The rule has been applied with equal impartiality in favor of and against neutrals and belligerents. It is perfectly immaterial what is the trade in which the party is engaged, or whether he be engaged in any. If he be settled bona fide in a country with the intention of indefinite residence, he is, *as to all foreign countries,* to be deemed a subject of that country. Without a doubt, in order to ascertain his 'domicile' it is proper to take into consideration the situation, the employment, and the character of the individual. The trade in which he is engaged, the family that he possesses, and the transitory or fixed character of his business are ingredients which may properly be weighed in deciding on the nature of an equivocal residence or domicile. But when once that domicile is fixed and ascertained all other circumstances become immaterial."

This rule seems to be borne out by a long line of decisions, but while it establishes the principle that a citizen of the United States acquires the status of an enemy if he is domiciled in a foreign country with which the United States is at war, and remains there more than a reasonable time after war is declared, it does not justify the assumption that such a citizen becomes a citizen of the enemy nation. Nor can it be accepted as authority for the proposition that a citizen of a hostile nation domiciled in the United States at the outbreak of war becomes entitled to the privileges of citizenship in this country even though he is treated as an enemy of his own country if he does not return within a reasonable time after war is declared. A number of cases are cited in the American & English Encyclopedia of Law in support of this general statement but when analyzed it is found that they deal with the status of a citizen of the United States who remains within the jurisdiction of a hostile nation after a declaration of war and not with the status of a citizen of a hostile nation who remains in the United States after war is declared.

In analyzing cases cited as authority for the proposition under consideration, we find that our Supreme Court has been called upon to pass upon this question in cases growing out of the war with England, the war with Mexico, the Civil war and the war with Spain. The principles established in the earlier cases have been followed with more or less uniformity and reference to the later cases is hardly necessary, except as a matter of historical interest.

One of the earliest cases is that which is entitled "The Venus," reported in 12 U. S. 253. In that case, a citizen of the United States had acquired a business or commercial domicile in England and before the outbreak of the war shipped goods to himself and associates in the United States. These goods were seized after war was declared and condemned as enemy property on the ground that the shipper, who was also a consignee, had acquired an enemy status by remaining out of the United States after the outbreak of war. Chief Justice Marshall, while upholding this principle, dissented on the ground that he should have been given a reasonable time within which to return to the United States before his enemy status became fixed.

The cases of "The Vowles" [5] and "The Frances," [6] reported in the same volume of United States Reports involved similar transactions.

A case growing out of the Mexican War was that of the *United States* v. *Guillem.*[7] In this case a citizen of France had acquired a domicile in Mexico. When war was declared he attempted to return to France on a ship which was seized while running the blockade. The court held that although he was a citizen of a neutral country he became impressed with an enemy status by being domiciled in a hostile country after the outbreak of the war but that he lost this hostile character when he attempted to return to France on a French ship immediately following the outbreak of the war; that while the ship was subject to seizure for running the blockade the person and property of the Frenchman were not.

Among the Civil War cases, cited in support of the proposition that domicile must determine enemy status, we find the cases of "The William Bagaley" [8] and *"Miller* v. *The United States."* [9]

In the first case a citizen of the North owned an interest in a vessel which was used by the Confederacy and was seized as a prize of war by the Federal Government. His interest was held to be enemy property and subject to confiscation.

5. 12 U. S. 347.
6. 12 U. S. 371.
7. 52 U. S. 60.
8. 72 U. S. 408.
9. 78 U. S. 306.

In the case of *Miller* v. *The United States* a citizen of the Confederate States owned stock in two Northern railroads and this interest was likewise confiscated on the ground that it belonged to an enemy of the United States and was being used for purposes inimical to the United States.

The latest reported case dealing with this subject appears to be that of *Jaragua Iron Co.* v. *United States*[9a] decided in February, 1909. In this case the Jaragua Iron Company was domiciled in the United States and had its main office in Pennsylvania. It was, however, engaged in business in Cuba and had acquired a commercial domicile there. Its property was destroyed for sanitary reasons under order of General Miles as an incident of the war with Spain. The Court held its Cuban property to be an enemy property and declined to allow compensation.

It will be observed that each of these cases deals with the status of American citizens who have acquired domiciles in countries with which the United States is at war, or who have property which is susceptible of use in aid or comfort of enemies of the United States.

It may, of course, be reasonably argued that if a subject of an enemy nation, domiciled in the United States and thereby becomes an enemy of his own country, he should not be treated as an enemy of the United States.

This is no doubt true as a matter of comity or of international hospitality but it can hardly be claimed that an alien under such circumstances is inherently, or as a matter of right, entitled to the privileges of citizenship. Such a presumption is rebutted by the statutes of the United States which sustain the third proposition, namely, that no alien can become a citizen of the United States without complying with the naturalization laws of this country.

To advert for the moment to certain elementary principles of law, we find that a citizen is defined by the authorities as one who by birth, naturalization, or otherwise, is a member of an independent political society and, as such, is subject to its laws and entitled to its protection in the enjoyment of civil or private

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9a. 212 U. S. 309.

rights.[10]

Naturalization is defined as "the act of adopting a foreigner and clothing him with the privileges of a native citizen." In the United States the power of naturalization is vested exclusively in Congress and can not be exercised by any of the States.[11]

By the Act of April 14, 1802, as amended, Congress has declared that "an alien may be admitted to become a citizen of the United States in the following manner and not otherwise." The provisions of the Act which prescribe the manner in which naturalization may be affected are substantially, as follows:

That a circuit or district court of the United States or a district or circuit court of the territories or a court of record of any of the States having common law jurisdiction and a seal and clerk may receive the declaration of an alien of his intention to become a citizen of the United States.[12] The same courts have power to entertain and pass upon applications for naturalization.[13]

The alien seeking admission to citizenship must declare upon oath before a competent court at least two years prior to his admission to citizenship that it is his bona fide intention to become a citizen,[14] and to renounce his allegiance to any prince, potentate, or state, particularly by name to the prince, or state whereof he is at the time a subject or citizen. This preliminary declaration of intention is, however, dispensed with in certain cases [15] (e. g. in the case of honorably discharged aliens who have enlisted and served in the United States Army or in the case of minors who have lived in the United States three years before reaching their majority). At the time of his application for citizenship the alien must declare on oath that he will support the Constitution of the

10. Blanck *v.* Pausch, 113 Ill. 60; Walsh *v.* Lallande, 25 La. Ann. 188; Lyons *v.* Cunningham, 66 Cal. 42; State *v.* Fairlamb, 121 Mo. 150; 3 Am. & Eng. Ency. of Law (1st ed.) 242; 6 Am. & Eng. Ency. of Law (2nd ed.) 15.

11. United States *v.* Villato, 2 Dall (Pa.) 373; Thurlow *v.* Conn., 5 How. (U. S.) 504; Smith *v.* Turner, 7 How. (U. S.) 283; Minneapolis *v.* Reum., 12 U. S. App. 446.

12. U. S. Revised Statutes, 2165.

13. Spratt *v.* Spratt, 4 Pet. (U. S.) 393.

14. Revised Statutes, 2165.

15. Revised Statutes, 2166, 2167.

United States; that he renounces and abjures all allegiance and fidelity to every foreign prince, potentate, or state; and these proceedings must be recorded.[16]

The alien must prove that he has resided within the United States five years at least, and within the state or territory where the court sits for one year, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. His residence must be proved other than by his oath. The courts acting upon such application consider both the law and the facts, and the decision of the court has the effect of a judgment and is conclusive as to all matters necessarily before the court and involved in the issue.[17]

It is obvious that under our naturalization laws enacted by Congress, no alien can acquire citizenship by proof of domicile in the United States, acquired prior to the outbreak of war. On the contrary, it is specifically provided by Sec. 2171, Revised Statutes, that:

> "No alien who is a native citizen or subject or a denizen of any country, state or sovereignty with which the United States are at war, at the time of his application, shall be then admitted to become a citizen of the United States; * * * nor shall anything herein contained be taken or construed to interfere with or prevent the apprehension and removal, agreeably to law, of any alien enemy at any time previous to the actual naturalization of such alien."

As such aliens are not entitled to citizenship and are not, therefore, inherently and as of right entitled to the protection of our laws in the enjoyment of civil or private rights, the only question for determination appears to be—Does a declaration of war have the effect of converting them from friendly strangers to alien enemies, or are they still to be regarded as entitled to the same international hospitality that is afforded neutral aliens?

In other words, does the fact that they are citizens or subjects of an enemy government cause them to acquire an enemy status?

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16. Revised Statutes, 2165, subdivision, 24.

17. Stark *v.* Chesapeake Ins. Co., 7 Cranch (U. S.) 420; Spratt *v.* Spratt, 4 Pet. (U. S.) 406; The Acorn, 2 Abb. (U. S.) 434.

While the cases actually cited to support the proposition that domicile is controlling in determining enemy status may be said to create a strong presumption in favor of the friendly status of subjects of enemy governments domiciled in the United States, the acts of Congress dealing with this subject do not specifically recognize any distinction between the subjects which are domiciled and those which are temporarily residing in this country.

Sections 4067 and 4068 Revised Statutes of the United States provide as follows:

Section 4067. "Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States, by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being males of the age of fourteen years and upward, who shall be within the United States, and not actually naturalized, shall be liable to be apprehended, restrained, secured and removed as alien enemies. The President is authorized, in any such event, by his proclamation thereof or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject, and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety."

Section 4068. "When an alien who becomes liable as an enemy, in the manner prescribed in the preceding section, is not chargeable with actual hostility, or other crime against public safety, he shall be allowed for the recovery, disposal, and removal of his goods and effects, and for his departure, the full time which is or shall be stipulated by any treaty then in force between the United States and the hostile nation or government of which he is a native citizen, denizen, or subject; and where no such treaty exists, or is in force, the President may ascertain and declare such reasonable time as may be consistent with the public safety, and according to the dictates of humanity and national hospitality."

It will be observed that Section 4067 provides in terms that:

"All natives, citizens, denizens, or subjects of the hostile nation or government * * *, who shall be within the United States *and not actually naturalized,* shall be liable to be apprehended, restrained, secured, and removed as alien enemies."

Congress has not excepted from the provisions of this Act subjects of enemy governments which are domiciled in the United States. It is true that the Act does not declare all subjects of enemy nations to be alien enemies. It merely provides that they shall be liable to be treated as such and those which have acquired a domicile in the United States are included in this class. It may be contended, with reason, that the status of such subjects, particularly those which have acquired a domicile here, remains that of friendly aliens until they are declared to be otherwise. The authorities would seem to justify this conclusion. In any event, however, the courts and text writers are agreed that any nation at war may permit such limited or restricted intercourse between its citizens and the citizens of a nation with which it is at war as it deems necessary or advisable.[18]

In some instances our courts have expressed doubt as to whether this restricted commercial intercourse between our citizens and the citizens of an enemy nation should be allowed by proclamation of the President or by an act of Congress. In dealing with this question in *Hamilton* v. *Dillin*,[19] the court said:

"In England this power to remit the restrictions on commercial intercourse with a hostile nation is exercised by the crown. Lord Stowell says: 'By the law and constitution of this country, the sovereign alone has the power of declaring war or peace. He alone, therefore, who has the power of entirely removing a state of war, has the power of removing it in part, by permitting, where he sees proper, that commercial intercourse which is a partial suspension of the war. * * * By the Constitution of the United States the power to declare war is confided to Congress. The executive power and the command of the military and naval forces is vested in the President. Whether, in the absence of Congressional action, the power of permitting partial intercourse with a public enemy may or may not be

18. Hamilton *v.* Dillin, 88 U. S. 73; Burbank *v.* Conrad, 96 U. S. 291.
19. Hamilton *v.* Dillin, 88 U. S. 87.

> exercised by the President alone, who is constitutionally invested with the entire charge of hostile operations, it is not now necessary to decide, although it would seem that little doubt could be raised on the subject. * * *
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> "But without pursuing this inquiry and whatever view may be taken as to the precise boundary between the legislative and executive powers in reference to the question under consideration, there is no doubt that a concurrence of both affords ample foundation for any regulations on the subject."

As Congress has specifically authorized the President to "direct the conduct to be observed on the part of the United States" towards resident subjects of enemy nations, his power in this regard is unequivocal.

In determining, therefore, the present status of such subjects it is necessary to consider any proclamations made by the President since war was declared. In the proclamation issued on April 6, he says in part:

> "All alien enemies are enjoined to preserve the peace towards the United States and to refrain from crime against the public safety, and from violating the laws of the United States and of the States and territories thereof, and to refrain from actual hostility or giving information, aid or comfort to the enemies of the United States, and to comply strictly with the regulations which are hereby or which may be from time to time promulgated by the President; and so long as they shall conduct themselves in accordance with law they shall be undisturbed in the peaceful pursuit of their lives and occupations, and be accorded the consideration due to all peaceful and law-abiding persons, except so far as restrictions may be necessary for their own protection and for the safety of the United States; and towards such alien enemies as conduct themselves in accordance with law, all citizens of the United States are enjoined to preserve the peace and to treat them with all such friendliness as may be compatible with loyalty and allegiance to the United States."

So long as the subjects of enemy nations preserve the peace, refrain from crime against the public safety, from actual hostility and from giving information, aid or comfort to the enemies of the United States and obey the State and Federal laws and regulations from time to time prescribed by the President.

they are authorized by this proclamation to pursue their peaceful occupations.

As such peaceful occupations will necessarily involve entry into contractual relations and having business intercourse with citizens of the United States, it would seem that until Congress by legislative action, or the President by proclamation or regulation, imposes restrictions, citizens of the United States may continue their ordinary transactions with those resident subjects of enemy nations who have not acquired an enemy status. If citizens of the United States should be prohibited from having any business intercourse of any kind with subjects of enemy nations domiciled or residing in the United States it would be difficult for such subjects to obtain the ordinary necessities of life and the Government might therefore be called upon in the interest of humanity to segregate and provide for the support of such subjects.

Business intercourse between the citizens of two nations at war, however, appears to be a matter of privilege rather than of right and is subject to such restrictions as either sovereign may impose.

It is probable that Congress will pass a "Trading with the Enemy Act," which will deal with this general subject.

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